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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~669~~ 49

BAIN PEANUT COMPANY OF TEXAS AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

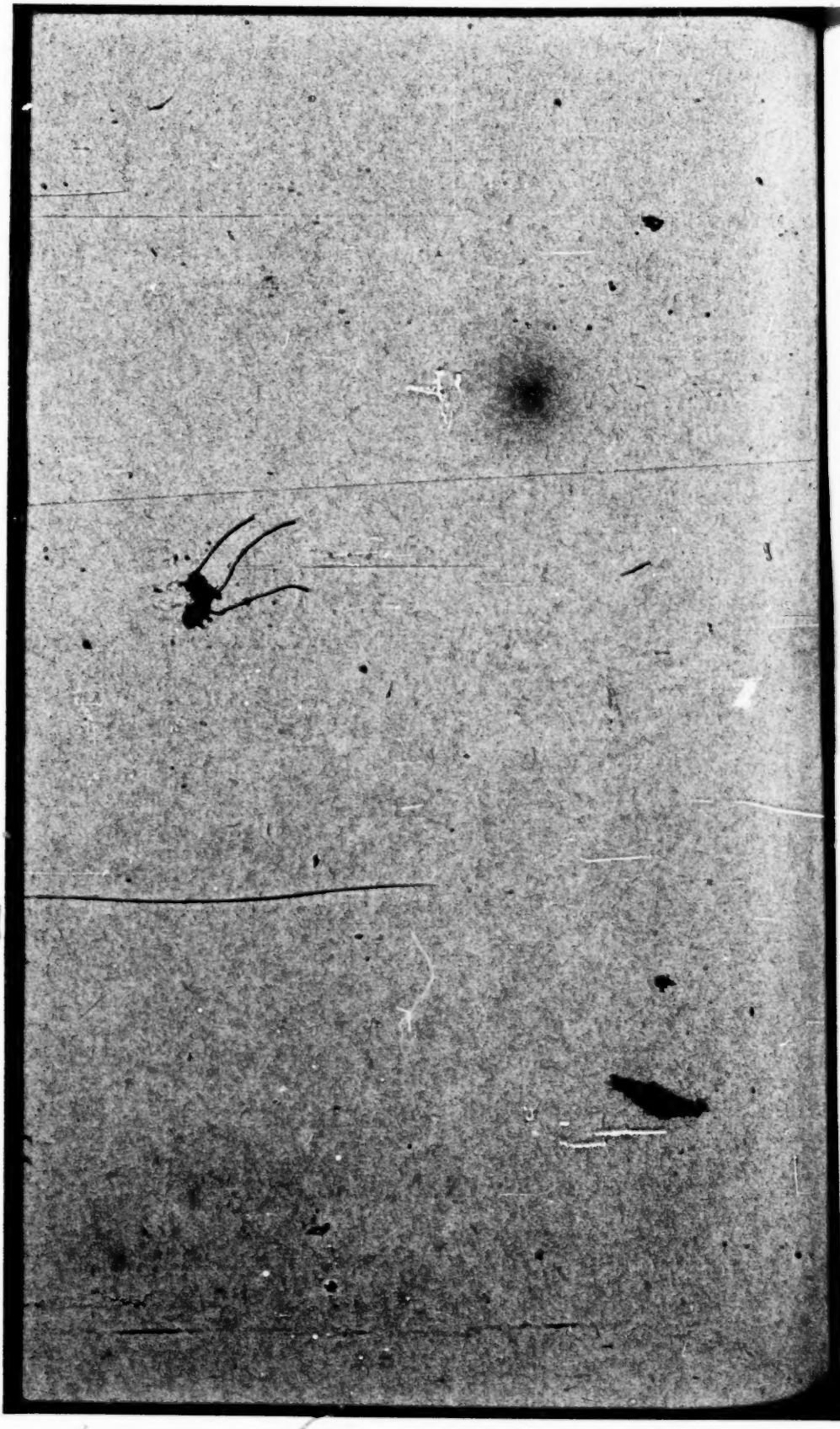
vs.

DAVE PINSON AND G. B. GUYGER

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

FILED FEBRUARY 15, 1930

(34,800)



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INDEX

	Original	Print
Proceedings in court of civil appeals of Texas	1	1
Caption (omitted in printing)	1	
Record from district court of Comanche County	2	1
Petition	2	1
Answer	7	3
Controverting affidavit to defendant's plea of privilege	9	3
Amended plea of privilege and demurrer to controverting affidavit	12	5
Decree	15	6
Assignments of error	21	8
Order overruling motion for new trial (omitted in printing)	22	
Assignments of error (omitted in printing)	23	
Supersedeas bond on appeal (omitted in printing)	25	
Judgment	27	9
Certified question to supreme court	28	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 24, 1930

	Original	Print
Order dismissing certificate, supreme court (omitted in printing)	31	
Opinion, Leslie, J.	33	11
Dissenting opinion, Funderburk, J.	42	17
Motion for rehearing	48	21
Order overruling motion for rehearing	50	22
Application for writ of error, supreme court	51	23
Order dismissing application for writ of error, supreme court (omitted in printing)	58	
Motion for rehearing, supreme court	59	26
Order dismissing application for writ of error, supreme court	63	28
Order overruling motion for rehearing, supreme court	63	28
Petition for appeal, assignments of error, and prayer for reversal	65	28
Order allowing appeal	69	32
Petition for stay of mandate and order allowing same (omitted in printing)	71	
Supersedeas bond on appeal.....(omitted in printing)..	74	
Citation and service.....(" " ")..	77	
Præcipe for transcript of record....(" " ")..	79	
Clerk's certificate.....(" " ")..	83	
Statement of points to be relied upon and stipulation as to parts of record to be printed	84	33

IN THE DISTRICT COURT OF COMANCHE COUNTY

[fols. a-2] No. 7043

PINSON & GUYGER

vs.

BAIN PEANUT COMPANY OF TEXAS

ORIGINAL PETITION—Filed June 5, 1924

To the Said Honorable Court:

Now come Dave Pinson and C. B. Guyger, composing the partnership of Pinson & Guyger, hereinafter styled plaintiffs, who reside in Comanche County, Texas, complaining of the Bain Peanut Company of Texas, a private corporation duly incorporated and doing business under the laws of the State of Texas, with its principal office and place of business at Fort Worth in Tarrant County, Texas, and that A. C. Barlow is Secretary, Treasurer and Manager of said Company and resides at Fort Worth, in Tarrant County, Texas, on whom service may be had in this case, which said Bain Peanut Company of Texas is hereinafter styled defendant, and for cause of action plaintiffs respectfully represent to the court:

1

That heretofore, to-wit, on or about the 1st day of November, 1923, the defendant, acting through and by its duly authorized accredited and acting agent, Bill Huxford, came to plaintiffs at Proctor, Comanche County, Texas, and entered into a contract with plaintiffs, by which it was agreed between the plaintiffs and defendant that the plaintiffs, who were dealers in and purchasers of peanuts, would buy peanuts for the defendant on the open market during the peanut season of 1923 and 1924, which was then [fols. 3-5] just beginning and that plaintiff would buy peanuts for no other parties. It was agreed that plaintiffs would pay their own money for the peanuts, which were to be purchased at the best price obtainable on the current

market from day to day and would store the said peanuts in a storehouse at Proctor, Texas, agreed on at the time between plaintiffs and defendant. That the said peanuts would be stored in such a manner as to cure and dry properly for shipment to the defendant's central plant or mill at Ft. Worth, Tarrant County, Texas, where it was agreed that the peanuts would be shipped as soon as properly cured. That the plaintiffs would pay for the storage and insurance on the peanuts while in storage, and drayage to the cars when they should be ready to ship to the defendant, as aforesaid. It was agreed that defendant would reimburse the plaintiffs for the original cost of the peanuts and for their insurance, storage and drayage and pay the plaintiffs for their services, a commission of Ten cents on every bushel which they should buy for the defendant.

[Paragraphs 2, 3, 4 and 5 allege performance by plaintiff and breach by defendant.]

[fol. 6] 6

Plaintiffs allege that the failure and refusal by the defendant to perform its said contract, duly and properly made and entered into in good faith by their agent, occasioned these plaintiffs an actual loss and damage on account of the fall in the price of peanuts of Five Thousand Eighty One Dollars and Fifty Eight cents ($5,081.58) and on account of money paid out for drayage Forty Six Dollars and Ten cents, ($46.10), insurance One Hundred and Seventy Eight Dollars and Eighty Nine cents ($178.89), agreed commission Six Hundred and Ninety Eight Dollars and Ten cents ($698.10), or a total of Six Thousand and Four dollars and Sixty Seven cents ($6,004.67) all of which loss and damage was directly and proximately caused these plaintiffs by the defendant's failure and refusal to perform its said contract, which said contract was made and was to be performed wholly in Comanche County, Texas.

Wherefore plaintiffs pray the court that defendant be cited in terms of law to appear and answer herein, and that on final hearing hereof they have their damage above

alleged with interest thereon from the date of said contract, and for cost of suit and for such other and further relief as in law and in equity, they may show themselves entitled to.

Callaway & Callaway, Attorneys for Plaintiffs, Pinson & Guyger.

[File endorsement omitted.]

[fol. 7] IN THE DISTRICT COURT OF COMANCHE COUNTY

ORIGINAL ANSWER—Filed July 8, 1924

Now comes the Bain Peanut Company of Texas, defendant herein, and, subject to its Plea of Privilege herein filed, and without waiving same, respectfully pleads as follows:

1

Defendant demurs generally to the allegations in plaintiff's Petition contained and says that same state no cause of action against it, and of this it prays judgment of the court.

[Paragraphs 2 and 3 are special exceptions and 4 a general denial.]

[fol. 8] Bryan, Stone, Wade & Agerton, Attorneys for Defendant, Bain Peanut Company of Texas.

[File endorsement omitted.]

[fol. 9] IN DISTRICT COURT OF COMANCHE COUNTY

CONTROVERTING AFFIDAVIT TO DEFENDANT'S PLEA OF PRIVILEGE—Filed July 15, 1924

To the said Honorable Court:

Now comes Dave Pinson and C. B. Guyger, and file this, their controverting plea to the Defendant's Plea of Privilege heretofore filed in this case on July 8th, 1924,

and for such controverting plea and affidavit, respectfully represents to the court.

1

That the venue of this suit is properly laid in Comanche County, Texas, under the provisions of Article 1830, subdivision 24 of the Revised Civil Statutes of the State of Texas, as shown by said subdivision and as shown by the allegations of the plaintiff's Petition.

That about the 1st of November, A. D., 1923, the defendant, acting through its duly authorized agent came to Proctor, Texas and made a contract with these plaintiffs wherein it was agreed that the plaintiff would go into the open market at the town of Proctor in Comanche County, Texas, and buy peanuts at the prevailing prices at the time they were offered on the streets and would pay their own money for said peanuts. That the plaintiffs would store said peanuts in the storehouse at Proctor agreed on between the plaintiffs and defendant and they would be kept there until cured and ready for shipment to Fort [fol. 10] Worth, Texas, to the defendant's peanut mills, that the plaintiffs would pay the storage and insurance on the peanuts and the drayage to the cars at the time of shipment, and it was agreed that such peanuts when ready to ship would be placed on board the cars consigned to defendant's mill at Fort Worth, Texas, the defendant would pay the plaintiffs their actual outlay for the peanuts and an additional compensation of 10 per cent per bushel for their services. That defendant breached said contract and refused to take the peanuts so bought by the plaintiffs, which peanuts amounted 6981 bushels and paid therefor an aggregate of $12,455.78; that at the agreed time of shipment the defendant notified plaintiffs at Proctor, Texas, that they would not comply with the said contract and have at all times refused to comply with the said contract and the plaintiffs were forced to sell the said peanuts on or about the — day of ——, 1924, at a loss to them of $6,004.67.

That the defendant is a private corporation and this cause of action arose in Comanche County, Texas, and the venue of this suit is properly laid in Comanche County, Texas, on account of such facts.

Wherefore the plaintiffs pray the court that he set a day for hearing of this plea of privilege and plaintiffs' controverting affidavit as of July 30th, 1924, and that defendant's attorneys be served with a copy of this affida-
[fol. 11] vit, in accordance with law.

Dave Pinson, C. B. Guyger.

[fol. 12] In District Court of Comanche County

[Title omitted]

Amended Plea of Privilege and Demurrer to Plaintiffs' Controverting Affidavit—Filed July 30, 1924

To the Honorable J. R. McClellan, Judge of said Court:

Now comes Bain Peanut Company, defendant in the above entitled and numbered cause, and files and urges this, its First Amended Plea of Privilege in lieu of its original Plea of Privilege heretofore filed in due order on the 8th day of July, A. D., 1924, and represents:

1

Defendant excepts and demurs generally to the controverting plea or affidavit herein filed on the 15th day of July, A. D., 1924, by the plaintiffs and says that such controverting plea or affidavit is wholly insufficient under the law to raise any issue of venue and jurisdiction in this court as against defendant's Plea of Privilege; wherefore defendant prays judgment of the court upon this, its demurrer, and that its plea of privilege be sustained and the case ordered transferred to the District Court of Tarrant County, Texas, without further proceedings.

Bryan, Stone, Wade & Agerton, Attorneys for Defendant.

2

That this defendant was not, at the date this suit was filed, nor at the time of service herein on it, nor was it at the date its original plea of privilege was filed, and is not
[fol. 13] now, at the filing of this, its amended plea of privi-

lege, a resident of or domiciled in Comanche County, Texas, the county where this suit was filed and is pending.

That this defendant does not now have or maintain and never has at any time prior hereto had or maintained an office, agency or local agent in Comanche County, Texas; and that this defendant now is and at all times hereto has been a resident of and domiciled in Tarrant County, Texas, and not elsewhere.

That none of the exceptions to exclusive venue to be sued in the county of one's residence mentioned in Art. 1830, or in Art. 2308 of the Revised Statutes of the State of Texas exist in this cause against this defendant.

Wherefore defendant urges this plea of privilege, and prays that no further action be had in the District Court of Comanche County, Texas, other than to transfer this cause to the District Court of Tarrant County, Texas, at Fort Worth, Texas.

Bain Peanut Company of Texas, by A. C. Barlow, Secretary-Manager. Bryan, Stone, Wade & Agerton, Attorneys for Defendant.

Duly sworn to by A. C. Barlow. Jurat omitted in printing.

[fol. 14] [File endorsement omitted.]

[fol. 15] In District Court of Comanche County

[Title omitted]

Decree

On this the 8th day of November, A. D., 1927, at a regular term of this court, came on to be heard the above entitled and numbered cause, it having been regularly reached on the docket of this court, and called for trial, and the plaintiffs appeared in person and by attorney and announced ready for trial, and the defendants appeared and presented their several demurrers and exceptions, which were over-

ruled, to which action due exception was taken, and the defendants thereupon announced ready for trial.

And thereupon came a jury which had theretofore been demanded, said jury consisting of twelve good and lawful men to-wit, A. G. Miller and eleven others, who, after having been duly selected, empannelled and sworn to try the case, and who after having heard the pleadings read, the evidence in the case, and the charge of the court submitting special issues, and the argument of counsel, retired to consider of their verdict; and thereafter on the 9th day of November, A. D., 1927, returned into open court their verdict upon the special issues submitted to them by the court, which issues and findings are as hereinafter set out; and thereafter on this the 15th day of December, 1927, came on to be heard plaintiff's motion for judgment and the same being considered by the court, the court renders judgment [fols. 16-18] on said motion the uncontradicted evidence and the special issues and answers thereto as follows: [fol. 19] And it appearing to the court from the pleadings in the case the evidence and the findings of the jury in answer to the issues submitted, that the plaintiffs are entitled to a judgment against the defendant for the sum of Six Thousand Eight Hundred Five and 40/100 Dollars, ($6805.40) for the breach of said contract, and it further appearing from the pleadings and the evidence and the uncontradicted facts of the case that the said amount, ($6805.40) is the total of the loss or damage sustained by the plaintiffs on account of the decline in the price of the peanuts alleged to have been bought, and the commission alleged to have been contracted to be paid to the plaintiffs and the other expenses alleged to have been incurred by the plaintiffs, according to the contract, and together with interest on said amount from the date of the alleged breach [fol. 20] of contract, all of which items were plead and proved and found by the jury as items of damage on account of the breach of the contract found to have been made.

It is therefore ordered, adjudged and decreed by the court that the plaintiffs Dave Pinson and C. B. Guyger, composing the firm of Pinson & Guyger, do have and recover of and from the defendant The Bain Peanut Com-

pany of Texas, a private corporation, the sum of Six Thousand Eight Hundred Five and 40/100 ($6805.40) Dollars, together with interest thereon from November 9th, 1927, at the rate of six per cent per annum, together with all cost in this behalf expended, with the exception of such costs as have heretofore been adjudged against the plaintiffs by the Court of Civil Appeals and the Supreme Court, for all of which let execution issue.

Endorsed: No. 7043, Pinson & Guyger vs Bain Peanut Company of Texas, Decree. Recorded in Vol. "S", pages 320-1-2.

[fols. 21–26] In District Court of Comanche County

Assignments of Error

Now comes Bain Peanut Company of Texas, defendant in the above entitled and numbered case, and assigns as error the action of the court on the trial of this case in overruling defendants General Demurrer to the controverting affidavit of plaintiffs in reply to defendants plea of privilege heretofore filed herein, and says the trial court erred in overruling said general demurrer and erred in refusing to sustain the same and transfer this cause to one of the District Courts of Tarrant County, Texas, as prayed for in defendant's plea of privilege, in that subdivision 23 article 1995 Revised Statutes of the State of Texas, with reference to venue of suits against a corporation under which plaintiffs controverted defendant's plea of privilege, and under which the court sustained the right of plaintiffs to sue defendant in Comanche County, Texas as against its plea of privilege, is unconstitutional and void and is in violation of the Fourteenth Amendment of the United States of America as being a discriminating classification between individuals and private corporations with respect to venue.

[fol. 27] IN COURT OF CIVIL APPEALS OF TEXAS, ELEVENTH SUPREME JUDICIAL DISTRICT

691-492

BAIN PEANUT COMPANY OF TEXAS

vs.

PINSON & GUYGER

JUDGMENT—July 12, 1929

This day came on to be heard, appellee's motion for rehearing, and the same having been duly considered by the Court, the court is of the opinion that said motion is well taken and should be granted; It is therefore the order, judgment and decree of the Court that appellee's motion for rehearing be and the same is hereby in all things granted, and that the previous order of this court entered on May 3, 1929, reforming the judgment of the trial court is hereby set aside and held for naught and the judgment of the trial court is hereby in all things affirmed; that Pinson & Guyger do have and recover of and from Bain Peanut Company of Texas and its surety, United States Fidelity and Guaranty Company, the amount adjudged below. It is further ordered that Bain Peanut Company of Texas and its surety, United States Fidelity and Guaranty Company, pay all costs incurred by reason of this appeal, for which let execution issue, and that this decision be certified below for observance.

[fol. 28] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

Appeal from the District Court of Comanche County

CERTIFIED QUESTION TO SUPREME COURT OF TEXAS

To the Honorable Supreme Court:

The above cause is pending in this court on submission. Appellant is a private corporation having its principal

place of business in Tarrant County. It was sued by appellees in Comanche County. To this suit it filed its plea of privilege to be sued in Tarrant County, the controverting plea of appellees to this plea of privilege sought to hold the venue in Comanche County under Subdivision 24 of Art. 1830, R. S., 1911, the statute in force at the time the pleading was filed. This exceptional provision appears in substantially the same form as Subdivision 23, Art. 1995, R. S., 1925. No other exceptional provision was relied upon by appellees to maintain venue in Comanche County. A general demurrer to the controverting plea was overruled and the case tried on its merits, resulting in a judgment in favor of appellees against appellant.

It becomes necessary, for a correct disposition of the appeal, to determine whether the trial court erred in overruling the demurrer to the controverting plea. It was not [fol. 29] claimed in the plea that appellant had an agency or representative in Comanche County, or that its principal office was situated therein, the claim being only that the cause of action, or a part thereof, arose in that county.

In the recent cases of Dublin Mill & Elevator Company vs. Cornelius, 5 S. W., (2d) 1027, and Houston Lighting & Power Company vs. Jenkins, 5 S. W., (2d) 1030, the Honorable Court of Civil Appeals for the Third District, at Austin, held that that portion of this exceptional provision authorizing suits against private corporations in any county in which a cause of action or a part thereof arose, involved a discrimination between an individual citizen and the private corporation, and was, therefore, repugnant to the Fourteenth Amendment of the Constitution of the United States, in that it deprives such corporation of the equal protection of the laws as well as protection of equal laws.

It is our opinion that a question of so frequent application and general importance should be authoritatively determined by the Supreme Court, and we, therefore, deem it advisable to certify to Your Honorable Court for decision the following question:

Is that provision of Subdivision 23, Art. 1995, R. S., 1925, readings as follows: "Suits against a private corporation, association or joint stock Company may be brought in any county in which the cause of action, or a part thereof,

arose," repugnant to the Fourteenth Amendment to the Constitution of the United States?

[fols. 30-32] An answer to the above question is respectfully requested.

John Edward Hickman, Chief Justice Court of Civil Appeals, 11th Supreme Judicial District.

"The foregoing certificate is ordered withdrawn from the Supreme Court because that Court, before acting upon it, has upheld the Constitutionality of the Statute involved in the case of Greyburg Oil Co. vs. N. P. Powell, — Texas, —; 15 S. W. (2nd) 542.

Done at Eastland, Texas, this 8th day of April A. D. 1929.

John Edward Hickman, Chief Justice Court of Civil Appeals, Eleventh Supreme Judicial District of Texas.

[fol. 33] In Court of Civil Appeals of Texas

No. 492

Bain Peanut Company of Texas, Appellant,

vs.

Pinson & Guyger, Appellees

Appeal from the District Court of Comanche County

Opinion—Filed July 12, 1929

This is the third appeal of this case. The first was from a judgment on a plea of privilege, the second and third from trials on the merits. The last trial which was before the court and jury resulted in a judgment on special issues in favor of the plaintiff, and the defendant Bain Peanut Company appeals.

The appellees as partners brought this suit against the apellant for damages arising from a breach of an alleged contract which was specifically alleged in paragraph 1 of their petition, as follows:

"That * * * on or about the first day of November, 1923, the defendant, Bain Peanut Company, acting through and by its duly authorized * * * agent, Bill Huxford, came to plaintiffs at Proctor, Comanche County, Texas, and entered into a contract with plaintiffs, by which it was agreed between the plaintiffs and defendant that the plaintiffs, who were dealers in and purchasers of peanuts, would buy peanuts for the defendant on the open market during the peanut season of 1923 and 1924 which was then just beginning, and that plaintiffs would buy peanuts for no other parties. It was agreed that plaintiffs would pay their own money for the peanuts, which were to be purchased at the best price obtainable on the current market from day to day, and would store the said peanuts in a storehouse at Proctor, Texas, agreed on at the time between plaintiffs and defendant. That the said peanuts would be stored in such a manner as to cure and dry properly for shipment to the defendant's central plant or mill at Fort Worth, Tarrant County, Texas, where it was agreed that the peanuts [fol. 34] would be shipped as son as properly cured. That the plaintiffs would pay the storage and insurance on the peanuts while in storage, and drayage to the cars when they should be ready to ship to the defendant, as aforesaid. It was agreed that defendanf would reimburse the plaintiffs for the original cost of the peanuts and for their insurance, storage and drayage, and pay the plaintiffs for their services a commission of ten cents on every bushel which they should buy for the defendant."

In subsequent paragraphs of the plaintiff's petition, estoppel and ratification were pleaded, and further:

"That the plaintiffs, all during the said peanut season, conferred from time to time with the defendant's agent (Huxford) and acted under the direction of the defendant's agent in making the purchases and in storing and handling the peanuts."

It was alleged that under and by virtue of said contract the plaintiffs purchased 6,981 bushels of peanuts of an aggregate value of $12,455.78, and that after said peanuts had been purchased, insured, stored, cured and handled in every way in accordance with the above mentioned contract, the plaintiffs demanded of the defendant, Bain Peanut Com-

pany, that it accept the shipment of peanuts and pay plaintiffs therefor according to the original contract. That the defendant refused to comply with the contract and rejected the peanuts, which were later sold by the plaintiffs for $7,374.20, the best price obtainable. This lawsuit is for the difference between that sum and the amount paid by plaintiffs for the peanuts, together with the sum of $46.10 drayage, $178.89 insurance, and an alleged commission of $698.10, aggregating $6,004.67, an alleged loss proximately resulting to plaintiffs by reason of the defendant's breach of the alleged contract, performable in Comanche County, Texas.

[fol. 35] The defendant interposed a plea of privilege to be sued in Tarrant County, Texas, and subject to this plea entered a general denial, etc.

The proposition on the court's action in overruling the plea of privilege to be sued in Tarrant County arises from the overruling of the defendant's demurrer to the plaintiffs' controverting affidavit. The plaintiffs rested their right to revenue in Comanche County upon the ground that the suit was against a private corporation on a cause of action arising in whole or in part in that county. This involved plaintiffs' right to hold venue in that county under subdivision 23, Art. 1995, R. S., which subdivision has recently been held discriminatory against private corporations, and therefore, unconstitutional. See Dublin Mill & Elevator Company vs. Cornelius, 5 S. W., (2d) 1027; Houston Light & Power Company vs. Jenkins, 5 S. W., (2d) 1030. However, those cases have recently been overruled by the Commission of Appeals in an opinion in the case of Grayburg Oil Company vs. N. P. Powell, approved by the Supreme Court. The point calls for no further consideration and the proposition presented is overruled.

One of the main contentions of the appellant is that the trial court erred in refusing to grant a new trial because of the newly discovered evidence of the witness Chisholm. More than ordinary showing is made in support of this proposition. There is, however, one reason appearing which forces us to the conclusion that the case should not be reversed because of this matter alone. At the time of the former trial appellant had notice that this witness probably knew facts material to the case. When the witness was [fol. 36] then asked by appellant's attorney about the mat-

ter he did not disclaim any such knowledge, but replied that if he was put on the witness stand he would tell the truth. This statement alone implied some knowledge. Appellant showed no lack of diligence by its failure to place him on the stand at that trial, not knowing what his testimony would be, and the trial being then in progress. Had this occurred at the last trial of the case when there was no time in a legal way to ascertain what he knew without being bound by what he said, we would be inclined to hold that appellant was fully acquitted of any want of diligence; but a year or more intervening between that time and the time the case was finally brought to trial, the appellant had ample opportunity to take the depositions of the witness and compel him to disclose his knowledge of the facts. Appellant having failed to do so, we think we would not be justified in holding that the trial court abused its discretion in refusing a new trial. Particularly do we think we are justified in this holding, in view of the fact that the witness Chisholm, when later approached, voluntarily made and delivered to appellant an affidavit setting forth the testimony it is claimed he would give on a re-trial of the cause. This proposition is overruled.

The judgment of the court below is challenged on the ground that there was no evidence of any authority on the part of Huxford as agent of the Bain Peanut Company to make the contract in question. The same question was pre- [fol. 37] sented on the former appeal and it appears that at the last trial the cause was tried on the same pleading as at the first trial and on substantially the same testimony. (287 S. W., 87.) In discussing the above contentions on the former appeal, this court said:

"The charge as a whole was excepted to and a peremptory instruction requested because the evidence introduced had no basis in appellees' pleading. It is asserted that the plaintiff's petition was based upon an alleged employment of appellees by Huxford as sub-agents for appellant to buy peanuts in unlimited quantities on their own judgment, and that the evidence showed conclusively that Huxford had no such authority. It is agreed that Huxford did not have authority to employ appellees as sub-agents to buy peanuts for appellant in unlimited quantities on the unrestrained judgment of appellees as to quantities and price, but we

do not concur in appellant's claim that such was the case made by the petition. The petition alleged specifically that the peanuts were bought from day to day under the immediate direction and control of Huxford. This allegation is a sufficient answer to the contention noted."

From the above quotation it conclusively appears that this court on the former appeal held that the plaintiff's petition sufficiently alleged a cause of action warranting recovery on the contract pleaded. The evidence supports the conclusion that the peanuts were, in fact, purchased under Huxford's supervision. Thus it appears that on the former appeal it was expressly held that Huxford had authority to make the questioned contract,—and that the pleadings were interpreted as declaring upon such contract as being a sufficient basis for recovery. On the former appeal the case reached the Supreme Court, and upon an opinion by the Commission of Appeals the Supreme Court reversed the judgment of this court and reformed and affirmed the judgment of the district court. In the Commission's opinion this language is used:

[fol. 38] "While there are thirty assignments of error contained in the application, none, other than that raising the question here discussed, presents an error which would require a reversal of reformation of the judgment of the trial court." (292 S. W., 203.)

The assignment sustained in that opinion raised a question of the right to recover interest as damages, etc. On motion for rehearing the Commission of Appeals, in its second opinion used this language:

"In our former opinion in this case we stated that 'while there are thirty assignments of error contained in the application, none, other than that raising the question here discussed, presents an error which would require reversal or reformation of the judgment of the trial court.' 292 S. W., 203. We are now of the opinion that one of the assignments does present reversible error." (294 S. W., 536.)

The assignment this time sustained was to the action of the court in admitting hearsay testimony. The judg-

ments of the district court and the Court of Civil Appeals were reversed upon the recommendation of the Commission upon that sole question.

Evidently the Supreme Court, through said opinions by the Commission, approved the interpretation or construction placed on the pleadings by this court on the former appeal, and resolved against the appellant the contention that Huxford had no authority to make with Pinson & Guyger said contract. The assignments raising the question of no evidence of any authority on the part of Huxford as agent of the Bain Peanut Company to make the questioned contract having been considered, (as evidently appears from the last quotations) and over-ruled, by the Commis- [fol. 39] sion, with the approval of the Supreme Court, as well as by this court, and the pleadings remaining unaltered, the testimony admittedly the same, the trial court having followed the former holdings, and the errors working a reversal of the judgment of the trial court on the first trial having been removed, we believe that, in obedience to said opinions, said assignments (again appearing in this record presenting the same contention) should be overruled, and the judgment affirmed. In doing so we regard the questions presented by the assignments as no longer open questions in this court.

There is no question but that the evidence in this record is sufficient to support the recovery if the contract declared upon in the petition is construed as alleging a contract for the purchase of peanuts from the appellees at such a price as to allow them to realize a profit of ten cents per bushel above the price paid and the necessary expenses incurred in preparing them for shipment, etc. On the other hand, if the contract declared upon be construed as one of subagency, then the evidence fails to establish authority in Huxford to bind the appellant thereby. The identical petition which is now before us has been construed by this court and evidently by the Supreme Court as declaring upon a contract of purchase. Therefore, if we should now view the petition differently we would not be authorized, as we understand the law and the powers of this court, to overrule what clearly appears to be a decision or holding of our Supreme Court.

[fols. 40 & 41] On original hearing the majority reformed the judgment of the trial court so as to exclude all items of recovery except the actual purchase price paid by appellees for the peanuts. Both parties have filed motions for rehearing, the appellant insisting that the judgment of the trial court be reversed and remanded on account of the insufficiency of the evidence to support any recovery, and the appellees insisting that the judgment of the trial court be in all things affirmed. Appellant's motion for rehearing will be overruled.

We believe that the agent Huxford was as fully authorized under the evidence to bind his principal for each element of the contract pleaded as he was to bind it to repay to appellees the purchase price of the peanuts, and that the contract in all of its terms was entire and not severable, and would support a recovery for the entire amount of the judgment below, if any recovery at all, and appellees' motion for rehearing is, therefore, granted.

The judgment heretofore entered by the court reforming the judgment of the trial court and affirming same as reformed, is set aside and the original opinion withdrawn, and in lieu thereof judgment will be here entered in all things affirming the judgment of the trial court, and this opinion will be substituted for the original.

W. P. Leslie, Associate Justice.

July 12th, 1929.

[File endorsement omitted.]

[fol. 42] In Court of Civil Appeals of Texas

[Title omitted]

Dissenting Opinion—Filed July 12, 1929

The writer is unable to concur in the opinion of the majority. The majority opinion simply adopts the construction of the pleadings in the former appeal. (287 S. W., 87.) No effort is made to justify that construction, and appar-

ently the sole justification for now adhering to it is the fact that the Supreme Court, in overruling all assignments in a writ of error prosecuted from that judgment, except two relating to entirely different question, is to be presumed to have passed upon and adopted such construction. I do not think it is our duty to adhere to a construction of a pleading which is manifestly wrong upon the authority of a mere presumption that the Supreme Court has passed upon it and approved it.

I think this court erred in its opinion upon the former appeal in failing to distinguish between allegations of the terms of the contract and allegations of operations under the contract. Upon that appeal it was contended by the appellant that the judgment should be reversed because plaintiff's petition was based upon an alleged employment of appellees by Huxford as sub-agents for appellant to buy peanuts in unlimited quantities on their own judgment, and that the evidence showed conclusively that Huxford had no such authority. In overruling that contention this [fol. 43] court for answer replied:

"The petition alleged specifically that the peanuts were bought from day to day under the immediate direction and control of Huxford. This allegation is a sufficient answer to the contention noted."

Manifestly it was not a sufficient answer, unelss it was an allegation of one of the provisions of the contract. Certainly, if the contract was one of employment, authorizing the agents to buy peanuts in unlimited quantities on their own judgment, any question of the agent's authority to make such contract could not be affected by anything done under the contract short of a ratification or estoppel. The judgment was not rested upon ratification or estoppel, nor indeed could it have been under the evidence in the case. The alleged terms of the contract are correctly set out in the majority opinion. It will be noticed that it is not one of such provisions that the peanuts were to be "bought from day to day under the immediate direction and control of Huxford." That allegation occurs in a recitation of what was done under the contract, and at a time subsequent to the making of same. Some of the provisions of the contract as alleged were that—

"Plaintiffs * * * would buy peanuts from the defendant on the open market during the peanut season of 1923 and 1924 * * * and that plaintiff would buy peanuts for no other party. It was agreed that plaintiffs would pay their own money for the peanuts which were to be purchased at the best price obtainable on the current market from day to day." (Italics ours.)

[fol. 44] In making proof of the contract containing such provisions it would have been a material variance to offer evidence of another provision, (not alleged), "that the plaintiffs all during the said peanut season" were to confer "from time to time with defendant's agent (Huxford)", and to act "under the direction of the defendant's agent in making the purchases and in storing and handling the peanuts." Such allegation was not only not made as a provision of the contract, but was not attempted to be proved as such, but merely of what was done under the contract. It is, therefore, clear to me that upon the former appeal this court sustained a recovery in behalf of appellants upon an entirely different contract in terms and legal effect than the one alleged in the petition. In order to bind appellee it was necessary to show, not that Huxford had authority to buy the peanuts or to make some kind of contract, but that he had authority to make the particular contract, alleged. The principle is so well established as often to be called axiomatic, that in a suit upon a contract the identical contract alleged must be proved.

Padgett Bros. vs. Dorsey, 194 S. W., 1124;
Gammage vs. Alexander, 14 Tex., 418;
Bagley vs. Black, 254 S. W. 247;
Western Union Tel. Co. vs. Smith, 88 Tex., 9, 28 S. W., 930, 30 S. W., 549.

The principle underlying this rule likewise requires that proof authority of an agent to make a contract means the particular contract in question and not another.
[fol. 45] Plainly the contract alleged is not one by which appellees agreed to sell peanuts to Bain Peanut Company. The contract alleged is one by which appellees were employed, not to sell peanuts to Bain Peanut Company, but

to purchase peanuts from day to day on the open market for the best price obtainable, as its agents and representatives, and for which services, among other things, a specified compensation was to be paid them. In operating under the contract alleged the ownership of the peanuts would pass immediately from the sellers in the open market, not to appellees, but to Bain Peanut Company. True, according to the allegations, appellees were to pay for the peanuts with their own money, but the allegations make clear that this was an advancement for Bain Peanut Company for which reimbursement was sought. What authority had Huxford to agree that Bain Peanut Company would pay appellees ten cents a bushel as a commission to purchase peanuts for it? If any such exists, it is implied by law from Huxford's status as agent with authority to purchase peanuts, for it cannot be gainsaid that there is not a word of testimony to show any express authority or any facts other than that of agency, and authority to purchase peanuts, from which such authority can be inferred. If he had implied authority to make such contract he could just as well have bound his principal to pay a salary of, say $100.00 a month. It certainly cannot be that any such authority exists by implication. What authority was Huxford shown to have had to bind Bain Peanut Company to reim- [fol. 46] burse appellees for such sums as they should advance to purchase peanuts? He had just as much authority to contract for a loan with the Proctor Bank for $10,000.00 with which to purchase peanuts and thereby obligate Bain Peanut Company to repay it, for, in either case it must be implied by law from the fact of agency and authority to purchase peanuts alone, there being no other evidence of authority. Suppose the agent had contracted with the bank for the $10,000.00 loan and had wholly misapplied it. Could it be contended for a moment that the bank could recover the advances from Bain Peanut Company upon proof of no other authority on the part of Huxford than is shown by this record, which, as said before, consists solely of the fact he was agent, with authority (limited at that), to purchase peanuts. If Huxford had no authority to contract for the payment of the commissions, then whatever other authority he had he could not bind appellant by the

particular contract alleged. As said in the majority opinion, the contract is one and indivisible. The authority requisite to make such contract must include authority to make every part of it.

Independently of everything else, the principle that one must recover, if at all, on the precise contract alleged, forbids a recovery in this case, because while the pleading alleged that one provision of the contract was that appellant would pay appellees ten cents a bushel for all peanuts purchased under the alleged contract, appellees themselves testified that the contract was that ten cents per bushel for such as were loaded on cars directly from wagons. Appellees thus affirmatively disproved the existence of the [fol. 47] contract alleged.

Much more might be said argumentatively to show that the contract alleged is not properly susceptible of any construction that would bring it within the authority of Huxford to make, as disclosed by undisputed evidence, but the above, it is thought, is sufficient to show the basis of my conclusion that the judgment of the trial court should be reversed and remanded.

O. C. Funderburk, Associate Justice.

July 12th, 1929.

[File endorsement omitted.]

[fol. 48] In Court of Civil Appeals of Texas

[Title omitted]

Appellant's Second Motion for Rehearing—Filed July 27, 1929

To the Honorable Court of Civil Appeals:

Since the Court on July 12, 1929, vacated and set aside both its original judgment and opinion rendered on May 3, 1929, and substituted in lieu thereof a judgment in all things affirming the judgment of the trial court as well as a new opinion, appellant now presents its motion for rehearing addressed to the judgment and opinion of the Court under date of July 12—being the only existing judgment and opinion of the Court on this Appeal.

Appellant respectfully represents that in affirming the judgment of the trial court, the Court committed prejudicial errors against it in the particulars hereinafter set out, which are submitted with prayer that the case be reversed and render or at least remanded for a new trial.

III

The Court erred in overruling appellant's Second assignment of error briefed under its second and third propositions and in sustaining the validity of Section 23, Art. 1995, [fol. 49] Revised Civil Statutes of Texas, despite the constitional objection that said statute arbitrarily discriminates in this case against appellant, a corporation, with respect to venue; and erred in declining to reverse and remand the cause with instructions to sustain appellant's plea of privilege to be sued in Tarrant County, Texas, because of the unconstitutionality of said statute.

Wherefore, appellant prays that its motion for rehearing be granted, the judgment of affirmance be set aside and that the case be reversed and rendered or reversed and remanded with instructions to sustain its plea of privilege and transfer the cause to Tarrant County for trial; or finally, in the event each of the foregoing prayers be denied, that the case be reversed and remanded for a new trial.

Bryan, Stone, Wade & Agerton, by B. G. Mansell, and B. G. Mansel, of Fort Worth, Texas, and George E. Smith, of Comanche, Texas, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 50] In Court of Civil Appeals of Texas

[Title omitted]

Order Overruling Appellant's Second Motion for Rehearing—October 18, 1929

This day came on to be heard, Appellant's second motion for rehearing, and the same having been duly considered by the court, is hereby overruled.

[fol. 51] IN SUPREME COURT OF TEXAS

APPLICATION FOR WRIT OF ERROR—Filed in Court of Civil Appeals Nov. 11, 1929; in Supreme Court Nov. 14, 1929

To the Supreme Court of Texas:

Grounds of Jurisdiction

Defendants in error sued for and recovered more than $1,000.00, hence the jurisdiction of the Court of Civil Appeals is not final under Article 1821, Revised Civil Statutes, 1925. The Supreme Court has jurisdiction for the several reasons set out below.

First Ground—Disagreement of Judges of Court of Civil Appeals

The Judges of the Honorable Court of Civil Appeals disagreed in their determination of this case upon a question of law material to the decision.

Fourth Ground—Validity of a Statute

As indicated in the preliminary statement plaintiff in error is a corporation domiciled in Tarrant County, Texas. In due time it presented its plea of privilege in statutory form seeking thereby to have the case transferred to one of the Civil District Courts of Tarrant County, Texas, for trial. The plea of privilege was controverted, and plaintiff in error demurred generally to the controverting affidavit. The demurrer was presented to and overruled by the Trial Court and due exception taken. Before expiration of the time for taking transcript out of the office of the District Clerk plaintiff in error filed, and there appears at page 10-f [fol. 52] of the Transcript, its assignment of error attacking the validity of that portion of subdivision 23, Article 1995, Revised Statutes of the State of Texas, which provides that a corporate defendant may be sued in any county in the State of Texas wherein the cause of action asserted against defendant, or any part thereof, arises. Defendants in error did not seek to maintain venue in Commanche County, Texas, under any other provision or subdivision

of the Venue Statute except that mentioned. By appropriate assignments of error and propositions in its original brief plaintiff in error urged upon the Court of Civil Appeals its contention that the portion of subdivision 23 Article 1995, Revised Statutes, referred to above, is a legislative attempt to discriminate against corporations and in favor of individuals similarly situated with respect to venue, and that said statute is therefore unconstitutional and void because in violation of the Fourteenth Amendment to the Constitution of the United States of America, which provides for the equal protection of laws and protection of equal laws between all citizens of the United States similarly situated. The Court of Civil Appeals overruled the contention noted and upheld the validity of the statute under authority of the case of Grayburg Oil Co. vs. N. P. Powell 15 S. W. (2nd) 542. In both its original and second motion for rehearing plaintiff in error assigned [fol. 53] and now assigns as error the action of the Court of Civil Appeals in upholding the validity of said statute and in refusing to reverse and remand the case to the District Court of Comanche County, Texas, with instructions to transfer it to one of the Civil District Court of Tarrant County, Texas, for trial.

Third Assignment (Being the Third Assignment in Plaintiff in Error's Second Motion for Rehearing, p. 2)

"The Court erred in overruling appellant's second assignment of error briefed under its second and third propositions and in sustaining the validity of Section 23, Art. 1995, Revised Civil Statutes of Texas, despite the constitutional objection that said statute arbitrarily discriminates in this case against appellant, a corporation, with respect to venue; and erred in declining to reverse and remand the cause with instructions to sustain appellant's plea of privilege to be sued in Tarrant County, Texas, because of the unconstitutionality of said statute."

Proposition

Plaintiff in error, Bain Peanut Company, having interposed in its plea of privilege in statutory form to be sued

in one of the District Courts in Tarrant County, Texas, and defendants in error having contested plaintiff in error's right to have said case transferred to Tarrant County, Texas, solely upon the ground that plaintiff in error was a corporation and that their alleged cause of action, [fol. 54] or a part thereof, occurred in Comanche County, Texas, and that plaintiff in error was therefore properly suable in Comanche County, Texas, under subdivision 24, Article 1830, Revised Statutes, 1911, (now being subdivision 23, Article 1995, Revised Statutes, 1925) and plaintiff in error having challenged the sufficiency of said controverting affidavit by general demurrer, the Court should have sustained general demurrer to defendants in error's controverting affidavit, and should have thereupon transferred this cause to one of the District Courts of Tarrant County, Texas, without further proceedings, as prayed for in said general demurrer, said subdivision 24, Article 1830, (Subdivision 23, Article 1995) being unconstitutional and void as being a discriminating classification in favor of individuals and against private corporations with respect to venue and therefore in violation of Section 1, of the 14th Amendment to the Constitution of the United States of America. (Being proposition No. 2, p. 7, Appellant's Original Brief, except that plaintiff in error is so designated in lieu of "Defendant" in said proposition.)

Authorities

Power Manufacturing Co. v. Saunders, 274 U. S. 489; 71 L. ed. 1165;

Kentucky Finance Co. v. Paramount Auto Exchange Co. 67 L ed. 1112;

Liggett Co. v. Baldridge, 73 L. ed. 45;

[fol. 55] Quaker City Cab Co. v. Pennsylvania, 72 L. ed. 927;

Frost v. Corporation Commission of Oklahoma, et al. 73 L. ed. 483.

Wherefore Plaintiff in error respectfully prays that this Honorable Court do grant a writ of error to the Honorable Court of Civil Appeals in order that the errors herein

pointed out and complained of may be reviewed and corrected. It further prays that on final hearing judgment of the Court of Civil Appeals and the Trial Court be reversed and rendered for plaintiff in error; or, in the alternative, that the judgment of both of said Courts be reversed and remanded, with directions that plaintiff in error's plea of privilege to be sued on one of the District Courts of Tarrant County, Texas, be sustained and the case transferred accordingly, as prayed for, that justice may be done.

Respectfully submitted.

Bryan, Stone, Wade & Agerton, by B. G. Mansell, Fort Worth, Texas, and George E. Smith, Comanche, Texas, Attorneys for Plaintiff in Error.

[fols. 56–58] [File endorsements omitted.]

[fol. 59] IN SUPREME COURT OF TEXAS

MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR—Filed Dec. 21, 1929

To the Supreme Court of Texas:

Bain Peanut Company of Texas, plaintiff in error, respectfully presents and urges this its motion for rehearing upon its petition for writ of error and prays the Court to set aside its order of December 11, 1929, dismissing said petition as for want of jurisdiction, and prays that said petition be granted, and that a writ of error be issued to the Honorable Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas for revision of the errors there committed in its disposition of said case.

Your petitioner respectfully submits that this Court has jurisdiction to grant its petition for writ of error because:

Plaintiff sued for and recovered more than $1,000.00; because upon final affirmance of the case below a motion for rehearing was duly presented urging each one and all of the questions involved in its petition for writ of error; because within thirty days after order overruling its motion for rehearing by the Court of Civil Appeals, its petition for writ of error was duly filed in the Court of Civil Ap-

peals and is now lodged in this Court and is before your Honors. Reference is here made to said petition for writ of error and petitioner respectfully prays that said petition in its entirety be considered as a part of this motion to the same extent as if here copied at length.

The jurisdiction of this Court is invoked and petitioner believes that that jurisdiction exists and should be granted [fol. 60] because:

(a) Associate Justice Funderburk of the Court of Civil Appeals dissented from the majority of the Court upon a proposition of law determinative of the issues of this case on the merits, to-wit, as to the proper construction of the contract declared upon by plaintiff below.

(c) Because the opinion of the Court of Civil Appeals involved the validity of a statute, to-wit; that portion of Subdivision 23, Article 1995, R. C. S., which subjected the defendant, a corporation, to suit in Comanche County, in the face of its plea of privilege to have the cause removed to Tarrant County, Texas, its domicile, for trial, solely on the ground that defendant was a corporation and that a part of the alleged cause of action arose in Comanche County, Texas. Defendant called into question the validity of said statute on the theory that it violated the Fourteenth Amendment to the Constitution of the United States, and its right thereunder, in that, said statute attempts to create an arbitrary classification discriminating against it and other corporations and in favor of individual litigants similarly situated with respect to venue of causes of action.

Subjoined hereto is an argument in support of the right of the Court to exercise its potential jurisdiction and to grant its petition for writ of error; and petitioner earnestly invites a careful consideration of that argument to the end that the order heretofore entered dismissing said petition as for want of jurisdiction be set aside, the applica- [fols. 61 & 62] tion granted and the case reversed on final hearing on the merits, that justice may be done.

Respectfully submitted.

Bryan, Stone, Wade & Agerton, by W. A. Keeling,
Attorneys for Petitioner.

Wherefore plaintiff in error respectfully and earnestly prays that its motion for rehearing and petition for writ

of error be granted, and that on hearing the case be reversed and remanded that justice may be done.

Bryan, Stone, Wade & Agerton, by B. G. Mansell,
Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 63 & 64] In Supreme Court of Texas

[Title omitted]

Order Dismissing Application for Writ of Error for Want of Jurisdiction—December 11, 1929

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Eleventh District and the same having been duly considered, it is ordered that the application be dismissed for want of jurisdiction; that applicant Bain Peanut Company of Texas and surety, U. S. Fidelity & Guaranty Co., pay all costs incurred on this application.

In Supreme Court of Texas

[Title omitted]

Order Overruling Motion for Rehearing of Application for Writ of Error—January 22, 1930

For rehearing of Application No. 17123. Overruled.

[fol. 65] In Court of Civil Appeals of Texas

[Title omitted]

To the Honorable William Howard Taft, Chief Justice, and to the Honorable Associate Justices of the United States Supreme Court.

Petition for Appeal, Assignment of Error, and Prayer for Reversal—Filed Jan. 23, 1930

I

Petition for Allowance of Appeal

Considering themselves aggrieved by the final decision of the Court of Civil Appeals for the Eleventh Supreme

Judicial District of the State of Texas in the above entitled cause, Bain Peanut Company of Texas, joined herein by United States Fidelity and Guaranty Company, surety on its supersedas bond on appeal to said Court of Civil Appeals, appellants herein, hereby pray that an appeal be allowed from said Honorable Court of Civil Appeals to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon.

Appellants respectfully represent that this case is one in which a review could have been had in the Supreme Court of the United States on writ of error under Sub-[fol. 66] division (a), Section 237, of the Judicial Code of the United States, as the same stood and was in force when the Act of January 31, 1928, abolishing the writ of error, was passed in this:

Appellant Bain Peanut Company of Texas, a private corporation organized under the laws of Texas, having its domicile in Tarrant County, Texas, was sued by appellees in the District Court of Comanche County, Texas. In due time and form said appellant presented its plea of privileges (statutory motion for change of venue) to the trial court praying that the case be transferred to one of the civil district courts of Tarrant County, Texas, for trial. Under the local practice, appellees controverted the plea of privilege and sought to sustain venue in the District Court of Comanche County under allegations and proof of the following facts alone:

(a) That Bain Peanut Company of Texas was a private corporation and,

(b) That the alleged cause of action arose in Comanche County, Texas. The general venue Statute of Texas in effect when the suit was filed (being now Article 1995, Revised Civil Statutes of Texas), provides that:

"No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:"

Subdivision 23 of said Article 1995, under which appellees controverted the plea of privilege and prayer for removal to Tarrant County reads in part as follows:

"Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose" * * *.

[fol. 67] Appellant Bain Peanut Company of Texas, by amended plea of privilege, demurred generally to the legal sufficiency of the controverting affidavit and again prayed for transfer of the case as in the first instance. The demurrer was overruled, and by appropriate assignment of error filed in the trial court the constitutionality of that portion of Subdivision 23, Article 1995, Revised Civil Statutes, was challenged as being in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily discriminated against said appellant, a private corporation, by subjecting it to suit in a county other than its domicile solely on the ground that it was a private corporation, and that the cause of action arose in Comanche County,—there being no provision of the venue statute under which individual or other litigants or classes of litigants than those named in the subdivision are suable outside of the counties of their domiciles upon the ground that a cause of action arose elsewhere; and that said statute in its application deprived said appellant of the equal protection of laws to which it is entitled under said constitutional provision as a citizen of the United States.

The Federal question thus raised was urged in the Honorable Court of Civil Appeals, considered and overruled by that court which held the statute complained of to be a valid enactment. That holding was assigned as error in motion for re-hearing before the Honorable Court of Civil Appeals; and after that Court had overruled the motion for re-hearing, said appellant presented its petition for writ of error to the Supreme Court of Texas, again urging the error so assigned. On December 11, 1929, the State Supreme Court dismissed the petition for [fol. 68] writ of error for want of jurisdiction, and on the 22nd day of January, 1930, overruled motion for rehearing on petition for writ of error, thus declining to take jurisdiction of and review the judgment of the Honorable Court of Civil Appeals and rendering the judgment of the latter court final.

It is thus seen that under the legislation in force when the Act of January 31, 1928, abolishing the writ of error, was passed, a review of the case could have been had in the Supreme Court of the United States by writ of error in that the judgment appealed from is a final judgment in the highest court of the State of Texas in which a decision in the suit could be had, where is drawn in question the validity of a statute of this State (Texas), on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. Section 237, United States Judicial Code, Subdivision (a).

II

Assignment of Error

And the said Bain Peanut Company of Texas and United States Fidelity and Guaranty Company assign the following error in the record and proceedings in this case:

1. The Honorable Court of Civil Appeals erred to the prejudice of appellants in upholding the constitutionality of the following portion of Section 23, Article 1995, Revised Civil Statutes of the State of Texas, to-wit:

"Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or any part thereof, arose"

[fol. 69] because said statute as upheld and applied in this case arbitrarily discriminates against appellant, Bain Peanut Company of Texas, a private corporation, by subjecting it to suit in a county other than its domicile in this: That individual and other litigants and classes of litigants than those named in said statute are not subject to suit outside of the counties of their domiciles upon the ground that "the cause of action, or a part thereof, arose" elsewhere. Wherefore appellants say said statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and, in its application, deprives appellant Bain Peanut Company of Texas of the equal protection of law to which it is entitled under said constitutional provision as a citizen of the United States.

III

Prayer for Reversal

For which error the appellants, Bain Peanut Company of Texas and United States Fidelity and Guaranty Company, pray that the said judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, dated July 12, 1929, in the above entitled cause, be reversed and a judgment rendered in favor of appellants, and for costs.

B. L. Agerton, Counsel for Appellants.

In Court of Civil Appeals of Texas

Order Allowing Appeal—Filed Jan. 23, 1930

The foregoing petition for allowance of an appeal and accompanying documents having been presented to me this 23rd day of January, 1930, the petition for appeal is allowed. Appeal and supersedas bond fixed at $10,000.00.

John Edward Hickman, Chief Justice Court of Civil Appeals for the 11th Supreme Judicial District of Texas.

[fol. 70] [File endorsement omitted.]

[fols. 71-73] Petition for stay of mandate and supersedeas and order thereon omitted in printing.

[fols. 74-82] Supersedeas bond on appeal for $10,000, approved and filed January 23, 1930, omitted in printing.

[fol. 83] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83½] Court of Civil Appeals of State of Texas.

[fol. 84] In Supreme Court of the United States

Statement of Points to be Relied Upon and Stipulation as to Printing Record—Filed Feb. 18, 1930

Come now appellants in the above entitled cause and state that the point upon which they intend to rely in this Court in this case is as follows:

That the following portion of Section 23, Article 1995, Revised Civil Statutes of Texas (formerly Sec. 24, Article 1830, R. C. S.), viz:

"Suits against a private corporation, association, or joint stock company, may be brought in any county in which the cause of action, or a part thereof, arose"

violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, by arbitrarily discriminating against the class of litigants therein named. And said statute, as upheld and applied by the Court of Civil Appeals in this case, denied appellant Bain Peanut Company of Texas, a private corporation domiciled in Tarrant County, Texas, of the equal protection of law to which it is entitled under the Constitution as a citizen of the United States, by subjecting it to suit in Comanche County upon allegation and proof alone that "the cause of action, or a part thereof, arose" in Comanche County; other classes of defendants than those mentioned in said [fol. 85] statute not being subject to suit outside their domiciliary counties in a similar situation.

And appellants further state that only the following parts of the record, as filed in this Court, need by printed by the Clerk for the hearing of the case; page references being to the original record sent up from the Court below:

1. Plaintiffs' original petition, R. 2-6, omitting, however, numbered paragraphs 2, 3, 4, and 5; but the Clerk may state that said paragraphs allege performance by plaintiff and breach by defendant.

2. Defendant's answer, R. 7-8, omitting, however, numbered paragraphs 2, 3 and 4; but the Clerk may state that

paragraphs 2 and 3 are special exceptions and 4 a general denial.

3. Plaintiffs' controverting affidavit, R. 9-11, omitting verification and other matters at page 11.

4. Defendant's demurrer to plaintiffs' controverting plea and amended plea of privilege, R. 12-14.

5. Decree or judgment of trial court, R. 15-20; omitting, however, special issues and answers of the jury at pages 16 to 19.

6. Defendant's assignment of error, R. 21.

7. Certified question by the Court of Civil Appeals to the Supreme Court, and order withdrawing same, R. 28-30.

8. Judgment of the Court of Civil Appeals, R. 27.

9. Majority opinion of Court of Civil Appeals by Associate Justice Leslie, R. 33-40.

10. Dissenting opinion by Associate Justice Funderburk, R. 42-47.

11. Appellants' second motion for rehearing—as shown in record, R. 48-49, with file date.

12. Order overruling second motion for rehearing, R. 50.

13. Bain Peanut Company's petition for writ of error to [fol. 86] the Supreme Court—as shown in record, R. 51-55, with file date in Court of Civil Appeals and Supreme Court.

14. Bain Peanut Company's motion for rehearing on petition for writ of error—as shown in record, R. 59-61—with file date in Supreme Court.

15. Certified copies of orders by the State Supreme Court with Clerk's certificate, R. 63, showing:

(a)—Dismissal of petition for writ of error.

(b)—Order overruling motion for rehearing thereon.

16. Petition for allowance of appeal to the United States Supreme Court, including assignment of error and order of allowance, R. 65-69, with file date.

17. Appellants' point designated herein upon which they rely for reversal and this designation of the portion of the record to be printed, together with the subjoined stipulation.

B. L. Agerton, Counsel for Appellants.

Stipulation

I, Mark Callaway, a member of the firm of Callaway & Callaway, attorneys of record for appellees, hereby ac-

knowledge receipt, on behalf of appellees, of a copy of the foregoing point designated by appellants as the only point upon which they will rely for reversal in the United States Supreme Court, as well as a copy of the foregoing designation of the portions of the original record to be printed by the Clerk of the United States Supreme Court; and service thereof is hereby waived.

And we, the undersigned attorneys for appellants and appellees, respectively, agree that the matters set out in the foregoing designation for printing shall be printed by the Clerk as the record for hearing in this case; that the petition for and order granting supersedeas, appellants' supersedeas bond and order of approval thereon, and certificate of the Clerk of the Court of Civil Appeals may be omitted in printing, but the Clerk shall make proper reference [fol. 87] thereto in conformity with the rules of the United States Supreme Court. The Clerk may also omit all captions, endorsements and file marks from the printed record, except where called for in the foregoing designation and where necessary to indicate the character of the document referred to.

B. L. Agerton, Counsel for Appellants. Mark Callaway, Counsel for Appellees.

[fol. 88-95] [File endorsement omitted.]

Endorsed on cover: File No. 34,800. Texas Court of Civil Appeals for the Eleventh Supreme Judicial District. Term No. 669. Bain-Peanut Company of Texas and United States Fidelity & Guaranty Company, appellants, vs. Dave Pinson and G. B. Guyger. Filed Fe*n*ruary 15, 1930. File No. 34,800.